IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1596

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN MAURO AND JOHN FUSCO

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS MAURO AND FUSCO

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PRELIMINARY STATEMENT

Statements as to the opinion below, jurisdiction, the question presented, the statute involved, and the statement of the case have been dispensed with pursuant to Rule 40 of the Rules of the Supreme Court.

SUMMARY OF ARGUMENT

As stated by the government in the petitioner's brief, this case presents the question whether a federal writ of *habeas corpus ad prosequendum* issued to state authorities to secure a prisoner for arraignment on federal charges constitutes both a "Detainer" and a "Request For Temporary Custody" under the Interstate Agreement on Detainers Act, P.L. 91-538, 18 USC. App., pp. 4475-4478.

Contrary to the position of the government as set forth in its brief in *United States v. Ford*, No. 77-52, Congress intended the United States to be a receiving state subject to Article IV of the Agreement.

The Interstate Agreement on Detainers was enacted to expedite the disposition of charges pending against prisoners in other jurisdictions and to minimize the disruptive effect upon rehabilitation caused by the shuttling of prisoners back and forth from one jurisdiction to another for the purpose of prosecution. This shuttling occurs when the United States obtains prisoners by means of the writ of *habeas corpus ad prosequendeum* and thus the Interstate Agreement on Detainers is directed against the evils caused by the production of prisoners by means of the writ, as well as the evils created by longstanding detainers.

In aid of the objectives of the Agreement, the participating parties have promised that where a prisoner is produced from one jurisdiction for trial in another, his trial will be prompt and will take place before his return, on penalty of dismissal of the charges against the prisoner.

Far from being a technical windfall, that sanction gives effect to the Agreement and indicates that the participating parties have held its goals of high importance.

Although the Speedy Trial Act of 1974 further implements some of the ends of the Agreement, there is no evidence that Congress intended the Interstate Agreement to be supplanted by the Speedy Trial Act. As the popular names of the respective

statutes imply, the Speedy Trial Act was enacted to provide prompt trials for all defendants, whether or not they are incarcerated, whereas the Agreement is specifically addressed to the problems created by the transfer of prisoners between sovereigns. The Speedy Trial Act was intended to preserve prior law with regard to interstate transfers.

Furthermove, the fact that the United States now finds itself discomfited by the Agreement is of no bearing in construing the intent of Congress in enacting the Agreement.

ARGUMENT

THE WRIT OF HABEAS CORUPUS AD PROSEQUENDUM IS BOTH A DETAINER AND A REQUEST FOR TEMPORARY CUSTODY MAKING APPLICABLE ARTICLE IV OF THE INTERSTATE AGREEMENT ON DETAINERS.

In its brief in *United States v. Ford, supra*, the government raises the argument that Congress did not intend the Interstate Agreement on Detainers to apply to the United States as a "receiving state". None of the appellate courts to consider the issue agree. As the Court of Appeals for the Second Circuit said in its decision in the present case ". . . The Agreement in clear and unequivocal language commits the United States to all of its terms, including Article IV." (Pet. App. 15a) See also *United States v. Kenaan*, 557 F2d 912 (CAI), petition for a writ of certiorari pending, No. 77-206; *United States v. Sorrell* and *United States v. Thompson*, C.A. 3, Nos. 76-1647 and 76-1976, decided August 22, 1977 (en banc) petition for writs of certiorari pending, No. 77-593; *United States v. Scallion*, 548 F2d 1168 (C.A.5), petition for a writ of certiorari pending, No. 76-6559; *Ridgeway v. United States*, 558 F2d 357 (C.A.6), petition for a writ of certiorari pending No. 77-5252; *United States v. Ricketson*, 498 F2d 367 (C.A.7).

1. In its analysis of the purposes and history of the Interstate Agreement on Detainers, the United States in its brief has narrowly stressed two points as the focus of the legislation.

First, the government contends that Congress enacted the Agreement in order to lend the states surer access to federal prisoners for the purpose of prosecution. This was necessitated by the decisons of *Smith v. Hooey*, 393 US 374, and *Dickey v. Florida*, 398 US 30. (Pet. brief p. 13). Secondly, the government contends that Congress enacted the Agreement in order to eliminate the abuses of the detainer system by the states. Long-standing and stale detainers were often maintained on federal prisoners, thereby damaging their prospects of rehabilitation (Pet. brief p. 13).

We do not dispute that Congress had these objectives in mind when it enacted the Agreement. By so narrowly limiting its analysis, however, the United States has distorted the context of the Agreement and ignored its wider purpose.

The government's interpretation of the Agreement is a unilateral one, characterizing state prosecutors and federal prisoners against whom state criminal charges are pending as the prime beneficiaries of the Agreement. It is the government's position that federal prosecutors do not require the Interstate Agreement because they may produce state prisoners by means of the *ad prosequendum* writ, and that there is never an adverse effect upon the rehabilitation of a state prisoner when so produced.[1]

[1]Notwithstanding the government's position, it appears that it has made extensive use of the detainer. See *United States v. Ford*, 550 F2d 732 at 742, n. 28, 29. Thus its abuse by the federal government is at least a possibility.

The language of the Agreement, however, has no unilateral aspect, and clearly manifests an intent that the transfer of both federal and state prisoners be controlled by its terms. Article II of the Agreement provides that the terms "State", "Sending State" and "Receiving State" shall mean, among others, the United States of America.[2] Thus, the avowed purpose of the Agreement, "to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints" clearly extends to the disposition of federal charges and detainers. It can, moreover, be seen from that language, that more than the determination of the proper status of detainers is contemplated. The expeditious and orderly disposition of charges emanating from other jurisdictions is an objective of equal importance, whether the charges be state or federal.[3]

As the government mentions, use of the writ to produce a state prisoner in federal court for trial has become "standard operating procedure" *United States v. Schurman*, 84 F. Supp. 411, 413 (S.D.N.Y.) (Pet. brief, p. 14). Were this court to exempt the writ of *habeas corpus ad prosequendum* from the operation of the Interstate Agreement on Detainers, then the fabric of the Agreement would be destroyed. The United States would be permitted to evade and circumvent the Agreement by simply utilizing the traditional writ. *United States v. Mauro* (Pet. App. 8a), *United States v. Sorrell* and *United States v. Thompson*

[2]The letter of Graham W. Watt, Assistant Commissioner of the District of Columbia, to the Chairman of the House Committee on the Judiciary is part of the legislative history and clearly indicates that the United States would be participating as a receiving state. (Pet. App. 12a n.9)

[3]See the statement of Senator Hruska, 116 Cong. Rec. 38840 (1970). "By approving (The Agreement) we can insure that the United States will become part of this vitally needed system of symplified and uniform rules for the disposition of pending criminal charges and the exchange of prisoners."

(C.A. 3) Nos. 76-1647 and 76-1976 decided August 22, 1977 (en banc) petition for writs of certiorari pending No. 77-593. See also *United States ex rel Esola v. Groomes*, 520 F2d 830 (C.A. 3).

2. The government argues that the Agreement on Detainers could not have been intended to apply to the writ, because the writ is mandatory, whereas the "request for temporary custody" contemplated by the Agreement is not. The government seeks also to distinguish the writ on the grounds that it has neither the attributes nor the harmful effects of the detainer (Pet. brief pp. 14-16).

Contrary to the government's position, whether the writ of *habeas corpus ad prosequendum* is mandatory is at best an open question. Although there is *dicta* to the effect that state compliance with the writ is a matter of comity between sovereigns, *Ponzi v. Fessenden*, 258 US 254, this court has not addressed itself to the question and has expressly refused to do so.[4] On the other hand, several circuit courts of appeal have expressed or implied the view that compliance with the writ is a matter of comity.[5]

Consequently, it was at best unclear when the Agreement was enacted in 1970 whether the writ had more than the force of a request in the production of state prisoners. The Agreement has

[4]"In view of the cooperation extended by the New York authorities, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation." *Carbo v. United States*, 364 US 611 at 621 n.20.

[5]*United States v. Oliver* 523 F2d 253 (C.A.2); *United States v. Arscue*, 187 F. Supp. 946, affirmed 323 F2d 784 (C.A.4); *United States ex rel Moses v. Kipp*, 232 F2d 147 (C.A.7); *Derenbowski v. U.S. Marshall, Minneapolis Office, Minn., Div.*, 377 F2 223 (C.A.8); *Stamphill v. Johnston*, 136 F2d 291 (C.A.9); *Lundsford v. Hudspeth*, 126 F2d 653 (C.A.10). See also, Anno, "Writ of Habeas Corpus Ad Prosequendum in Federal Courts, 5 LEd, 964.

resolved this uncertainty by codifying the manner in which the request for temporary custody may be utilized.[6]

The term "detainer" is not defined in the Agreement. As the court below noted, however, the legislative history contains a definition offered by Congressman Kastenmeier in proposing the Agreement: "For the purpose of the legislation a detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to stand trial on pending criminal charges in another jurisdiction." 116 Cong. Rec. 13999 (1970). (Pet. App. 6a, 7a)[7] The writ originally served upon the Warden of the Aubrun Correctional Facility gave the Warden just that notification (A.9). It is for this reason that the court below was correct in holding that the writ operates as a detainer for the purpose of the Agreement. Although the writ is not the administrative "hold" that the word "detainer" usually brings to mind, its character as official notification of pending criminal prosecution triggers the application of the Agreement.

The United States attempts to distinguish the detainer from the writ on the ground that the former defers charges, whereas the latter signals an intent to proceed. (Pet. Brief 15) It relies upon the rationale of Judge Mansfield, dissenting, in the court below, that "The writ is executed at once and upon return of the prisoner to the state institution, it does not remain outstanding against him as would a detainer." (Pet. App. 20a)

In the absence of further restriction, however, the language employed in the writ would allow the defendant to be shuttled back and forth indefinitely from his place of confinement to his

[6]A Congressional understanding that the writ is not mandatory is at least implicit in the legislative history of the Agreement. The Senate Report, 1970, 3 U.S. Code Cong. and Admin. Laws 4864 at 4865 stated, ". . . A Governor's right to refuse to make a prisoner available is *preserved* . . ." (Emphasis supplied)

[7]See also the Senate Report, S. Rep. No. 1356, 91st Cong. 2d Sess., 3. U.S. Code and Admin. News 4864, 4865 (1970).

place of trial.[8] Congress, in enacting the Agreement, apparently viewed such shuttling of prisoners to be contrary to its objectives. Article V(e) of the Agreement provides that, "At the earliest practicable time consonant with the purpose of this Agreement, the prisoner shall be returned to the sending state." Article IV(e) of the Agreement provides,

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e), hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

As the court below held, it is plain from this language that Article IV(e) of the Agreement was designed to avoid the shuttling of prisoners back and forth as destructive of their ability and desire to participate in rehabilitative programs. (Pet. App. 10a) Participation in an ongoing treatment program requires continuous physical presence which is not possible when multiple trips are made to a foreign jurisdiction. Furthermore, the psychological strain resulting from the possibility of a future sentencing decreases an inmate's desire to participate in a treatment program, *United States ex rel Esola v. Groomes*, 520 F2d 830 at 837 (C.A. 3)

Hence, the error of Judge Mansfield in his dissent in the court below. Although the writ is immediately executed, it is an instrument of multiple transfer, and does not dispose of the prospect of prosecution which remains in the mind of both

[8]The writ involved in John Mauro's case provided that the defendant be produced on a specified day, and ". . . at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, Auburn Correctional Facility, Auburn, N.Y., under safe and secure conduct." (A.9)

prisoner and Warden.[9] This effect of the writ is clearly one to which the Agreement is addressed.

The government argues that treatment of the writ as a "detainer" is inconsistent with the plain language of the Agreement, as well as its purpose, since the Agreement appears to regard the lodging of a detainer and a request for custody as discrete events. (Pet. Brief p. 6)[10]

The detainer and the request will often occur at different times. There is no reason, however, that they may not occur simultaneously, when it is remembered that a detainer is essentially a notification of pending charges. As the court below correctly held, to hold otherwise would be to permit the United States to evade the Agreement simply by using the traditional writ. If the request for custody and the detainer must be separate documents in order for the Agreement to be binding, then the Agreement has "wax teeth and is an exercise in legislative futility". *United States ex rel Esola v. Groomes, supra*, 520 F2d at 837. Furthermore, a construction of the Agreement to the effect that the writ cannot serve as a detainer would controvene the proviso of Article IX of the Agreement that, "This agreement shall be liberally construed so as to effectuate its purposes."

The government argues that it may not now circumvent the purposes of the Agreement by utilizing the writ, because the purposes of the Agreement are safeguarded by the Speedy Trial Act of 1974. The government points to the provisions of the Speedy Trial Act regarding trial of prisoners obtained from other

[9]The confining institution may well alter a prisoner's status after his return from the receiving jurisdiction because of its awareness of pending prosecution. Thus the writ may well be treated as a detainer by the receiving jurisdiction.

[10]Article IV(a) provides that a prosecutor in a receiving state, "shall be entitled to have a prisoner against whom he has lodged a detainer . . . made available . . . upon presentation of a written request . . .".

jurisdictions.[11] (Pet. Brief p. 17). This argument has little or no bearing in the construction of Congressional intent in enacting the Agreement. The Agreement was enacted in 1970.[12] The Speedy Trial Act of 1974 was actually enacted in 1975.[13] If the rights of prisoners, as recognized by the Agreement, were safeguarded only by the Speedy Trial Act, then a five year hiatus emerges in the statutory scheme which Congress must have contemplated in implementing the goals of the Agreement.[14]

At the heart of the government's contention vis-a-vis the Speedy Trial Act is a request that this court dismiss the Agreement as mere surplusage, and to repeal it, because, in the government's opinion a subsequent act of Congress serves the same purpose. There is, however, a presumption against construing a statute as containing mere surplusage, *United States v. Blasius*, 397 F2d 203, 207, and a request that the Agreement be repealed is more appropriately addressed to Congress, *Dorszynski v. United States*, 418, US 424, 442 (1974). Most importantly, the Speedy Trial Act and the Agreement were enacted to achieve different purposes, although they overlap. The goal of a swift trial is of course common to both, but it is but a corollary to the Agreement's major objectives. That their purposes differ is seen from the fact that the "no return" proviso of Article IV(e) of the Agreement does not appear in the Speedy Trial Act. It is natural that it would not, since it is clearly designed

[11]The Speedy Trial Act of 1974 provides that the United States must promptly secure a state prisoner for trial or file a detainer against him after charging him with a crime. 18 USC. (Supp. V) 3161 (J) (I). If the prisoner is produced for arraignment, he must be tried within sixty (60) days.

[12]Pub. L.91-538 Sec s., Dec. 9, 1970, 84 Stat. 1397-1403.

[13]Pub. L.93-619, Title I, Sec. 101, Jan. 3, 1975, 88 Stat. 2076.

[14]Ironically, it has been particularly within that period that the government has ignored the Agreement in the production of state prisoners.

to prevent the shuttling of prisoners back and forth, with its attendant effects of their prospects of rehabilitation. (Pet. App. 10a) In recognition of the distinct purposes of the two Acts, Congress provided in the Speedy Trial Act that a prisoner's right to contest the legality of his transfer from one jurisdiction to another is preserved. 18 USC. Supp. V 316 (J)(4).[15]

Thus the material consequence of including the *ad prosequendum* writ in construction of the term "detainer" is that the Agreement is given full effect. Although, the government may consider imposition of the Article IV(e) sanction a technical windfall, Congress apparently intended otherwise. In enacting the Agreement, Congress did not deal with an individual situation, but with a scheme for the production of prisoners that is national in scope. Its prime concern was that the government comply with that scheme. *United States v. Sorrell*, 413 F. Supp. 138 at 141 (E.D.P.A.).

As the government observes, it is difficult in this case to determine whether the use of the writ in producing the respondents had effect upon their eligibility for rehabilitative programs. (Pet. Brief p. 19). The government, however, fails to state the reason for that difficulty. The government had lodged detainers against the respondents prior to producing them by writ. (Pet. Brief p. 6n 5). Those detainers were for contempt of court, the self-same conduct which was the basis of the indictments against them. Because of these detainers, all privileges were denied them. (A 23, 28, 32).[16]

[15]"In preserving the defendant's right to challenge the legality of his being surrendered by the custodial authority, the Committee does not intend in any way to change existing law." House Report No. 1508, 4 U.S. Code & Admin. News 7478.

[16]The respondents argued in the court below, and they note their position here, that the government did all it could to call the machinery of the Agreement into play. Detainers, albeit for civil contempt, were lodged against them prior to their production in federal court. Those detainers described the charges against the respondents as "contempt of court" (A-28). There would have been little reason for a new detainer to be lodged against them stating the same charge arising out of the same indictment.

In conclusion, an examination of the Interstate Agreement on Detainers Act compels the conclusion that Congress intended it to provide the exclusive means of effecting a transfer between two participating jurisdictions for the purpose of prosecution. The Agreement is applicable whenever a state prisoner is transferred for trial in federal court by means of the writ of *habeas corpus ad prosequendum*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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